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8 IN THE UNITED STATES DISTRICT COURT  
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA  
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11 ISIDRO ROMERO,

No. C-07-6382 TEH (PR)

12 Petitioner,

13 v.

ORDER DENYING PETITION FOR WRIT  
OF HABEAS CORPUS

14 ROBERT AYERS, Warden

15 Respondent.  
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18 Pro se Petitioner Isidro Romero, a state prisoner  
19 incarcerated at San Quentin State Prison, California, seeks a writ  
20 of habeas corpus under 28 U.S.C. § 2254 challenging the California  
21 Board of Parole Hearings' ("BPH") March 7, 2007 decision to deny him  
22 parole, which, for the reasons that follow, the Court denies.  
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24 I

25 Below is a brief factual summary of Petitioner's  
26 commitment offense, as set forth in the state appellate court  
27 opinion affirming the judgment of the trial court.  
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1 During a party, Sergio Cruz, a noninvitee,  
2 attempted to coax one of the guests, Sophia,  
3 outside. Although Cruz and Sophia had  
previously dated, Sophia refused to leave the  
house.

4 Cruz returned hours later accompanied by  
5 [Petitioner] and others. When Sophia still  
6 refused to leave with Cruz, catcalls were made  
7 until a fight erupted between those inside the  
8 house and Cruz and his friends. During the  
brawl, witnesses identified [Petitioner] as  
stabbing Jose Gomez, Sophia's cousin.  
[Petitioner], Cruz and the others fled.

9 Gomez's autopsy revealed he died from eight  
10 stab wounds. [Petitioner] was arrested at a  
hospital while being treated for cuts and  
11 bruises. Blood tests showed [Petitioner's]  
blood alcohol level to be .16.

12 [Petitioner] admitted at trial he  
13 accompanied Cruz to the party and was involved  
14 in a fight, but denied stabbing anyone. In  
addition he admitted drinking beer but denied  
feeling its effect.

15 People v. Romero, 153 Cal. App.3d 757, 759 (1984).

16 On May 16, 1985, Petitioner was sentenced to sixteen-  
17 years-to-life in state prison following his conviction by a jury in  
18 Orange County of second degree murder with an attached deadly weapon  
19 enhancement. Doc. #6-1 at 23. His minimum eligible parole date was  
20 August 25, 1991. Id.

21 On March 7, 2007, Petitioner appeared before BPH for his  
22 eleventh parole suitability hearing. Doc. #6-1 at 21 & 23; Doc. #6-  
23 3 at 2. At the conclusion of the hearing, BPH found Petitioner was  
24 "not suitable for parole and would pose an unreasonable risk of  
25 danger to society or a threat to public safety if released from  
26 prison." Doc. #6-2 at 30.



1 application of, clearly established Federal law, as determined by  
2 the Supreme Court of the United States; or (2) resulted in a  
3 decision that was based on an unreasonable determination of the  
4 facts in light of the evidence presented in the State court  
5 proceeding." 28 U.S.C. § 2254(d). Under this deferential standard,  
6 federal habeas relief will not be granted "simply because [this]  
7 [C]ourt concludes in its independent judgment that the relevant  
8 state-court decision applied clearly established federal law  
9 erroneously or incorrectly. Rather, that application must also be  
10 unreasonable." Williams v. Taylor, 529 U.S. 362, 411 (2000).

11 While circuit law may provide persuasive authority in  
12 determining whether the state court made an unreasonable application  
13 of Supreme Court precedent, the only definitive source of clearly  
14 established federal law under 28 U.S.C. § 2254(d) rests in the  
15 holdings (as opposed to the dicta) of the Supreme Court as of the  
16 time of the state court decision. Williams, 529 U.S. at 412; Clark  
17 v. Murphy, 331 F.3d 1062, 1069 (9th Cir. 2003).

18 The state court decision to which 28 U.S.C. § 2254 applies  
19 is the "last reasoned decision" of the state court. See Ylst v.  
20 Nunnemaker, 501 U.S. 797, 803-04 (1991); Barker v. Fleming, 423 F.3d  
21 1085, 1091-92 (9th Cir. 2005). Although Ylst primarily involved the  
22 issue of procedural default, the "look through" rule announced there  
23 has been extended beyond the context of procedural default. Barker,  
24 423 F.3d at 1092 n.3 (citing Lambert v. Blodgett, 393 F.3d 943, 970  
25 n.17 (9th Cir. 2004) and Bailey v. Rae, 339 F.3d 1107, 1112-13 (9th  
26 Cir. 2003)).



1 parole if in the judgment of the panel the prisoner will pose an  
2 unreasonable risk of danger to society if released from prison."  
3 Cal. Code Regs. tit. 15, § 2402(a). In making this determination,  
4 BPH must consider various factors, including the prisoner's social  
5 history, past criminal history, and base and other commitment  
6 offense, including behavior before, during and after the crime. See  
7 Id. § 2402(b)-(d).

8 California's parole scheme "gives rise to a cognizable  
9 liberty interest in release on parole" that cannot be denied without  
10 adequate procedural due process protections. Sass v. California Bd.  
11 of Prison Terms, 461 F.3d 1123, 1128 (9th Cir. 2006); McQuillion v.  
12 Duncan, 306 F.3d 895, 902 (9th Cir. 2002). It matters not that a  
13 parole release date has not been set for the inmate because "[t]he  
14 liberty interest is created, not upon the grant of a parole date,  
15 but upon the incarceration of the inmate." Biggs v. Terhune, 334,  
16 F.3d 910, 915 (9th Cir. 2003).

17 Petitioner's due process rights require that "some  
18 evidence" support BPH's decision finding him unsuitable for parole.  
19 Sass, 461 F.3d at 1125. This "some evidence" standard is  
20 deferential, but ensures that "the record is not so devoid of  
21 evidence that the findings of [the board] were without support or  
22 otherwise arbitrary." Superintendent v. Hill, 472 U.S. 445, 457  
23 (1985). Determining whether this requirement is satisfied "does not  
24 require examination of the entire record, independent assessment of  
25 the credibility of witnesses, or weighing of the evidence." Id. at  
26 455. Rather, "the relevant question is whether there is any  
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1 evidence in the record that could support the conclusion reached by  
2 the disciplinary board." Id. at 455-56.

3 Due process also requires that the evidence underlying  
4 BPH's decision have some indicium of reliability. Biggs, 334 F.3d  
5 at 915; McQuillion, 306 F.3d at 904. Relevant to this inquiry is  
6 whether the prisoner was afforded an opportunity to appear before,  
7 and present evidence to, BPH. See Pedro v. Oregon Parole Bd., 825  
8 F.2d 1396, 1399 (9th Cir. 1987). If BPH's determination of parole  
9 unsuitability is to satisfy due process, there must be some reliable  
10 evidence to support the decision. Rosas v. Nielsen, 428 F.3d 1229,  
11 1232 (9th Cir. 2005).

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13 B

14 Petitioner seeks federal habeas corpus relief from BPH's  
15 March 7, 2007 decision finding him unsuitable for parole and denying  
16 him a subsequent hearing for one year on the ground that the  
17 decision does not comport with due process. Specifically,  
18 Petitioner claims BPH's decision was not supported by "some  
19 evidence." Doc. #1.

20 As an initial matter, the record shows that BPH afforded  
21 Petitioner and his counsel an opportunity to speak and present  
22 Petitioner's case at the hearing, gave them time to review documents  
23 relevant to Petitioner's case and provided them with a reasoned  
24 decision in denying parole. Doc. #6-1 at 29-33; Doc. #6-2 at 30-38.

25 The record also shows BPH relied on several circumstances  
26 tending to show unsuitability for parole and that these  
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1 circumstances formed the basis for its conclusion that Petitioner  
2 was "not suitable for parole and would pose an unreasonable risk of  
3 danger to society or a threat to public safety if released from  
4 prison." Doc. #6-2 at 30; see Cal. Code Regs. tit. 15, § 2402(a)  
5 (stating that a prisoner determined to be an unreasonable risk to  
6 society shall be denied parole).

7 In rendering its decision, BPH cited the circumstances of  
8 the commitment offense, in that it was "carried out in a very cruel,  
9 very cold and callous manner" that "demonstrated a very callous  
10 disregard for human suffering." Doc. #6-2 at 30. BPH further  
11 observed that the motive for the crime "was extremely trivial in  
12 relation to the offense." Id. at 31.

13 Further, BPH expressed concern that from 2000 through  
14 2005, Petitioner's participation in Alcoholics Anonymous was  
15 minimal; specifically, he attended once in 2000, not at all in 2001,  
16 twice in 2002, once in 2003, and not at all in 2004 and 2005. Doc.  
17 #6-2 at 35. BPH noted that during the evidentiary portion of the  
18 hearing, Petitioner "admitted that the culture that [he] grew up  
19 with[,] . . . [his] father was a heavy drinker and may be an  
20 alcoholic and the culture that's surrounding [Petitioner] and the  
21 way [he] grew up was that everybody drinks." Doc. #6-2 at 36.  
22 Given Petitioner's blood alcohol level at the time of the commitment  
23 offense was twice the legal limit, BPH expressed trepidation that if  
24 remaining sober "were the top priority in [Petitioner's] life, [his  
25 minimal, sporadic attendance at Alcoholics Anonymous from 2000  
26 through 2005] would never happen. [Petitioner] would fully  
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1 understand that continued support in keeping . . . sober is the  
2 number one goal in [his] life to survive." Id. at 35.

3 BPH then made the following findings:

4 [Petitioner] need[s] to continue with all types  
5 of documented self-help in order to face,  
6 discuss, understand and cope with stress in a  
7 nondestructive manner. Until progress is made,  
8 the prisoner continues to be unpredictable and a  
9 threat to others.

10 And, sir, it's not just stress. It's  
11 really do whatever you need to do to get a  
12 better understanding and to be able to  
13 communicate with a future panel as to what  
14 brought you to make the decisions you did that  
15 evening. There's a lot of questions and we  
16 ended up leaving here with more questions than  
17 what we have answers for. And that [is] to  
18 understand what functional alcoholism is. And  
19 we really question whether or not, how  
20 inebriated you were during the life crime, okay?

21 So, basically, sir, we're giving you a  
22 another one year denial. And I highly recommend  
23 that you use that time wisely to get additional  
24 self-help, to get a better understanding of why  
25 you did the things you did. We recommend that  
26 you remain disciplinary-free, and that if  
27 available, you continue to upgrade vocationally  
28 and educationally, and also participate in self-  
help. And update those support letters, okay?

19 Doc. #6-2 at 37-38.

20 In a six-page written decision, the state superior court  
21 affirmed the decision of BPH to deny Petitioner parole, finding that  
22 it was supported by "some evidence." Doc. #6-3. The court noted:

23 It is unnecessary for this court to  
24 determine whether petitioner's commitment  
25 offense alone would have supported the Board's  
26 decision herein, because the unsuitability  
27 determination herein was not limited solely to  
28 the commitment offense, but instead was based on  
evidence.

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2 The transcript of the 3/7/07 parole  
3 suitability hearing indicates that the Board of  
4 Parole Hearings addressed the factors required  
5 by law and provided an individualized  
6 consideration of these factors as they related  
7 to petitioner. Therefore, his claim that the  
8 result was pre-determined, arbitrary and  
9 capricious is unfounded.

10 A major reason for the Board's conclusion  
11 that petitioner still represents a threat to  
12 public safety involved its concern that  
13 petitioner had not shown that he would abstain  
14 from alcohol abuse if released. Petitioner was  
15 admittedly drunk at the time of the offense, and  
16 an admitted alcoholic who began drinking at age  
17 15. His alcohol abuse also contributed to his  
18 prior criminal record. The 2005 psychological  
19 assessment stated petitioner's Axis I Diagnosis  
20 as "Alcohol Abuse in full institutional  
21 remission" and identified his foremost risk  
22 factor as the potential for alcohol relapse.  
23 The report's conclusion that petitioner posed a  
24 minimal risk to the community if released was  
25 expressly conditioned upon his continued  
26 abstention from alcohol use and his continued  
27 involvement with alcohol recovery activities.

28 The factors relied on by the Board in  
denying parole (i.e., petitioner's commitment  
offense, criminal history, social history,  
parole plans and self-help issues) are connected  
to his alcoholism. Because his threat to  
society if released is directly related to his  
permanent abstention from alcohol use, the  
Board's conclusion that he would still pose a  
threat to society if released, based on the  
aforementioned deficiencies in this area  
(including but not limited to his failure to  
regularly attend AA from 2000 through 2005), is  
supported by the record. Consequently, the  
denial of parole is supported by "some evidence"  
and was not an abuse of discretion. (In re  
Rosenkrantz (2002) 29 Cal. 4th 616).

Doc. #6-3 at 6-7.

Although the state superior court cited only state law in  
its decision denying Petitioner's due process claim, the court

1 correctly identified the "some evidence" standard that applies under  
2 federal law; therefore this Court must determine whether the state  
3 court applied the standard unreasonably to the facts. See Lockhart,  
4 250 F.3d at 1232. After a careful review of the record, the Court  
5 finds that the state court's conclusion that BPH's decision to deny  
6 Petitioner parole was not supported by "some evidence" was not  
7 contrary to, nor did it involve an unreasonable application of,  
8 clearly established federal law, and it was not based on an  
9 unreasonable determination of the facts. See 28 U.S.C. § 2254(d);  
10 Williams, 354 F.3d at 1106. The evidence shows Petitioner's  
11 commitment offense occurred when he was under the influence of  
12 alcohol, with a blood alcohol level twice the legal limit.  
13 Petitioner's social history involved a culture where alcohol often  
14 was abused; if paroled, Petitioner planned on returning to that very  
15 culture. Based on these considerations, especially when viewed in  
16 conjunction with the nature of the commitment offense, this Court  
17 cannot say that BPH's finding that Petitioner was unsuitable for  
18 parole was "without support or otherwise arbitrary." See Hill, 472  
19 U.S. at 457.

20           Given the evidence before the Court, BPH reasonably  
21 concluded that Petitioner was not yet suitable for parole. See,  
22 e.g., Rosas, 428 F.3d at 1232-33 (upholding denial of parole based  
23 on gravity of offense and the petitioner's psychiatric reports  
24 documenting his failure to complete programming while in prison);  
25 Biggs, 334 F.3d at 916 (upholding denial of parole based on gravity  
26 of offense and the petitioner's conduct prior to imprisonment);  
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1 Morales v. California Dep't. of Corrections, 16 F.3d 1001, 1005 (9th  
2 Cir. 1994), rev'd on other grounds, 514 U.S. 499 (1995) (upholding  
3 denial of parole based on the cruel nature of offense, the  
4 petitioner's unstable and criminal history, and his need for further  
5 psychiatric treatment). It is not up to this Court to "reweigh the  
6 evidence." Powell v. Gomez, 33 F.3d 39, 42 (9th Cir. 1994).

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8 IV

9 For the reasons set forth above, the Petition for a Writ  
10 of Habeas Corpus is DENIED. The Clerk shall terminate any pending  
11 motions as moot, enter judgment in accordance with this order and  
12 close the file.

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14 IT IS SO ORDERED.

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16 DATED 03/26/10

  
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THELTON E. HENDERSON  
United States District Judge

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